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DECISION of the Three-Judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973:

DUANE LARKIN, M.D.,

Plaintiff,

v.

No. 73-C-360

HAROLD WITHROW, D.O., et al.,

Defendants.

DECISION

On November 19, 1973, this three-judge court sustained the plaintiff's procedural due process challenge to the constitutionality of § 448.18 (7) Wis. Stats. (1971). We enjoined the state medical examining board from enforcing that statute, which authorized it to suspend a physician's license for up to two consecutive three-month periods "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has engaged in certain proscribed conduct. Vague as it is, "(E)ngaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public" qualifies as one such offense. See § 448.18 (1) (a), Wis. Stats. (1971).

Permanent revocation of a physician's license can be accomplished only through a court action prosecuted by the district attorney. The state medical examining board investigated the plaintiff, Dr. Duane Larkin, and presented charges to the district attorney. See § 447 [sic], Wis. Stats. (1971). Neither the propriety of the board's investigation of Dr. Larkin nor the merits of its charges against him was involved here. What we determined was that for the board temporarily to

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suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as § 448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision-maker, we concluded that it was unconstitutional and unenforceable.

Procedural due process is required in those instances where a person stands to see significant interference with his property rights or his liberty. *Board of Regents v. Roth*, 408 U.S. 564 (1972). In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

The suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." *Suarez v. Weaver*, — F. 2d — (7th Cir., case number 72-1656, decided September 14, 1973). See also *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and *Weiman v. Updegraff*, 344 U.S. 183 (1952).

In several cases involving hearings required by due process, the United States Supreme Court has delved into the area of minimal due process requirements. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court reaffirmed the principle of *Morrissey v. Brewer*, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decision-maker." 411 U.S. at 786. The state medical examining board

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does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney.

It is true that any action taken by the board pursuant to § 448.18 (7) is subject to judicial review under § 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional.

For these reasons, on November 19, 1973, we ordered that the plaintiff's motion for a preliminary injunction be granted. The defendants were enjoined from enforcing the provisions of § 448.18 (7), Wis. Stats. (1971), it having been determined by us that such statute is unconstitutional.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1973.

s F. Ryan Duffy
F. Ryan Duffy, Sr. Circuit Judge

s John W. Reynolds
John W. Reynolds, U.S. District Judge

s Myron L. Gordon
Myron L. Gordon, U.S. District Judge

JUDGMENT on Decision by the Court, dated January 31, 1974:

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 73-C-360

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DUANE LARKIN, M.D.,

Plaintiff,

JUDGMENT

vs.

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK
T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.,
individually and as members of the Medical Examining Board
of the State of Wisconsin,

Defendants.

This action came on for hearing before the Court, Honorable
F. Ryan Duffy, Senior United States Circuit Judge, Honorable
John W. Reynolds, United States District Judge and the
Honorable Myron L. Gordon, United States District Judge,
presiding, and the issues having been duly heard and a deci-
sion having been duly rendered.

It is Ordered and Adjudged that §448.18 (7), Wis. Stats.,
is unconstitutional and that the defendants are preliminarily
enjoined until further notice from utilizing the provisions of
§448.18 (7), Wis. Stats.

APPROVED:

s F. Ryan Duffy

F. Ryan Duffy, Sr. U.S. Circuit Judge

s John W. Reynolds

John W. Reynolds, U.S. District Judge

s Myron L. Gordon

Myron L. Gordon, U.S. District Judge

Dated at Milwaukee, Wisconsin, this 31st day of January,
1974.

s Ruth W. LaFave
Clerk of Court

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NOTICE OF APPEAL to the Supreme Court of the United States, dated February 28, 1974, and filed in the United States District Court for the Eastern District of Wisconsin on March 1, 1974:

DUANE LARKIN, M.D.,

Plaintiff,

v.

No. 73-C-360

HAROLD WITHROW, D.O.;

NOTICE OF APPEAL

THOMAS HENNEY, M.D.;

TO THE SUPREME COURT

A. J. SANFELIPPO, M.D.;

OF THE UNITED STATES

JOHN M. IRVIN, M.D.;

J. W. RUPEL, M.D.;

A. L. FREEDMAN, M.D.;

MARK T. O'MEARA, M.D.;

THOMAS W. TORMEY, JR., M.D.;

individually and as members of
the Medical Examining Board of
the State of Wisconsin,

Defendants.

NOTICE IS HEREBY GIVEN that the defendants do hereby appeal to the Supreme Court of the United States from the judgment of the three-judge court in the captioned matter entered on the 31st day of January, 1974, by the three-judge court of the United States District Court for the Eastern District of Wisconsin made up of the Honorable F. Ryan Duffy, Sr., United States Circuit Judge, the Honorable John W. Reynolds, United States District Judge, and the Honorable Myron L. Gordon, United States District Judge.

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This appeal is taken pursuant to 28 U.S.C. §1253.

Dated this 28th day of February, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton

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